

Michael K. Lindsey was convicted of five counts of theft as class D felonies on the basis of his guilty plea. Lindsey was ordered to pay restitution to the victims as a term of probation. Lindsey challenges the order of restitution, presenting the following issues for review:

1. Did the trial court err in conducting a restitution hearing in which Lindsey was not represented by counsel?
2. Did the trial court err in entering an order of restitution without inquiring into Lindsey's ability to pay and without setting forth the manner in which restitution was to be paid?

We reverse and remand.

The facts favorable to the convictions are that between February 28 and March 7, 2007, Lindsey stole tools and equipment from his employer, Mayken Industries, Inc., and sold them to the Paradise Pawn Shop (the Pawn Shop) for \$960.00. On March 16, 2007, Lindsey was charged with five counts of theft as class D felonies. On January 17, 2008, he pleaded guilty as charged. He was sentenced to two years for each conviction, with the sentences to run concurrent to one another, and suspended to probation. As a condition of probation, Lindsey was ordered to pay restitution to the victims, Mayken and the Pawn Shop. The court ordered the probation department "to prepare and file a report as to restitution", after which Lindsey would be given an opportunity to file an objection or concur in the restitution order. *Transcript* at 8.

Both Mayken and the Pawn Shop filed a Victim Affidavit For Restitution. On March 17, 2008, the State filed a motion for a restitution hearing and for determination of disposition of property. On April 9, 2007, a restitution hearing was held, at which the chief

deputy prosecutor, Lindsey's probation officer, Lindsey, and Kenneth May, the owner of Mayken, were in attendance. The docket reflects that Lindsey's counsel had been notified about the hearing but did not attend. The Pawn Shop had paid Lindsey \$960.00 for the items Lindsey stole from Mayken. Thus, the Pawn Shop sought reimbursement in the amount of \$960.00. Mayken sought reimbursement in the amount of \$5,066.84 for the tools, or the tools themselves, \$3,360.00 for lost profits incurred as a result of Mayken's inability to complete several jobs while it was without its tools, which were being held as evidence, and \$74.27 for having to change the locks on Mayken's doors. Following the hearing, the trial court ordered Mayken to pay the \$960.00 it had received from Lindsey¹ to the court, which would in turn forward it to the Pawn Shop, after which the stolen equipment would be released to Mayken. Lindsey was also ordered to pay \$3,360.00 to Mayken.

On April 30, 2008, Lindsey filed a motion to correct error, which stated in relevant part as follows:

3. That on March 27, 2008, the Court scheduled a hearing for April 9, 2008, on the sole issue of the return of the property to the victim.

4. That instead of determining the sole issue as to return of the property to the victim, the Court apparently held a hearing as to restitution, at which hearing the Defendant was unrepresented by counsel.

5. That the Defendant was Ordered to pay restitution in the sum of \$3,360.00 based on the victim's inability to utilize the stolen tools during the pendency of this matter.

6. That the Defendant paid the specific sum of \$960.00 to the victim on March 15, 2007, fifteen days after the theft of the first tool, and eight

¹ Shortly after his arrest, Lindsey paid \$960.00 to May so that Mayken could retrieve its stolen items from the Pawn Shop.

days after the theft of the last tool, yet the victim refused to pay such sums to Paradise Pawn Shop to secure the return of his tools.

7. That any loss of use was occasioned specifically by the victim's conduct, and not the conduct of the Defendant.

8. That it is counsel's understanding that there was no actual evidence of loss suffered by the victim submitted at [the] hearing on April 9, 2008, as required by law.

Appellant's Amended Appendix at 79-80. The trial court denied Lindsey's motion to correct error and this appeal ensued.

At the outset, we commend the State for its candor in acknowledging several procedural defects below that ultimately require remand. Although the State offers plausible argument that Lindsey waived some of the defects, such as counsel's failure to appear at the restitution hearing on April 9, 2007, it goes on to acknowledge that remand may be required. The State is similarly candid in acknowledging that the evidence may not have been legally sufficient to support the damages awarded by the court. The State is correct on both counts. The fact that this matter must be remanded for further proceedings obviates the need for this court to discuss several counter-arguments offered by the State, including the adequacy of the record submitted by Lindsey. With these comments, we proceed to the relevant issues.

1.

Lindsey contends the trial court erred in conducting a restitution hearing in which he was not represented by counsel.

Lindsey contends, among other things, that counsel did not receive notice of the April 9 restitution hearing, and of course that the trial court erred in conducting the hearing when

Lindsey was unrepresented by counsel. Although the State takes issue with the first contention, it more or less concedes the second, as reflected in the following: “The trial court, however well-intentioned . . . conducted the April 9, 2008 hearing without Defendant’s counsel being present, and entered a restitution order. . . . [T]he State acknowledges that it may have been improper to hold the April 9, 2008 hearing in absence of Defendant’s counsel.” *Appellee’s Brief* at 9. Indeed it was. *Cf. Adams v. State*, 693 N.E.2d 107, 109 (Ind. Ct. App. 1998) (recognizing that “sentencing is a critical state of the proceedings at which a defendant is entitled to representation by counsel”). A restitution order is part of the criminal sentence. *McKenney v. State*, 848 N.E.2d 1127 (Ind. Ct. App. 2006).

Lindsey notes in discussing this issue that on June 5, 2008, a hearing was held on his motion to correct error and that Lindsey’s counsel did attend this hearing. He also notes that there appears to be no transcript of the June 5 hearing and thus no way to determine whether the deficiencies at the April 9 hearing were corrected at the June 5 hearing. The State acknowledges, “[u]nless a record . . . can be produced, it may be necessary to remand for another hearing on these issues for which Defendant’s counsel is present so his attorney has the opportunity to challenge the amount of restitution.” *Appellee’s Brief* at 10. Again, we agree. At present, it appears that no transcript of the June 5 hearing has been filed, which we presume means there is none to be found. Lacking such a transcript or an agreed entry submitted by the parties summarizing the substance of the hearing, we have no way of knowing whether, with counsel present, Lindsey was able to properly litigate the issue of restitution. Therefore, as conceded by the State, this matter must be remanded for the

purpose of conducting a restitution hearing at which Lindsey is represented by counsel.

2.

Lindsey contends the trial court erred in entering an order of restitution without inquiring into his ability to pay and without setting forth the manner in which restitution was to be paid. Although we have already determined that the trial court must conduct a new restitution hearing, we will briefly address these arguments, as they are relevant to the hearing upon remand.

Pursuant to Ind. Code Ann. § 35-38-2-2.3(a)(5) (West, PREMISE through 2008 2nd Regular Sess.), as a condition of probation, the trial court may order a defendant to:

[m]ake restitution or reparation to the victim of the crime for damage or injury that was sustained by the victim. When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance.

The reason for requiring this inquiry is to ensure that a defendant is not imprisoned based on an inability to pay restitution. *Laker v. State*, 869 N.E.2d 1216 (Ind. Ct. App. 2007). We can find no indication that the trial court made any inquiry into Lindsey's ability to pay restitution. We note also that the trial court did not specify the manner of performance. These deficiencies should be corrected upon remand.

Judgment reversed and remanded.

MAY, J., and BRADFORD, J., concur